

North Carolina Takes a Big Leap: “Opportunity to Misappropriate” Trade Secrets Enough for a Preliminary Injunction (PI)

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In last month’s [Horner v. McKoy](#) decision, the North Carolina Court of Appeals appeared to lower the evidentiary threshold needed to obtain a preliminary injunction preventing the inevitable disclosure of trade secrets. The Court equated an “opportunity to misappropriate” trade secrets with a “threat of misappropriation” under the [North Carolina Trade Secrets Protection Act](#), without requiring the types of evidence other courts have often required before entry of an injunction.

The Case

Plaintiff Horner International Company manufactures and sells natural extracts and flavors, including cocoa, chocolate, coffee, tea, fenugreek, ginseng, and chamomile all over the world. Horner produced flavors for a number of industries, but the largest industry it serviced was tobacco.

Defendant Bill McKoy was a 24-year veteran in the flavor industry before he spent six years at Horner managing its North Carolina manufacturing plant. While working for Horner, McKoy became physically ill, allegedly as a result of heavy exposure to some of the processes at the plant. McKoy's doctors recommended that he find a new job. McKoy then left Horner to become the Facilities Manager for Teawolf, a New Jersey flavor producer in the food and beverage industry.

Horner brought suit seeking a preliminary injunction for McKoy's alleged violation of his non-competition agreement and for a claim of misappropriation of Horner trade secrets based on an inevitable disclosure theory.

The Decisions

The trial court found the non-compete agreement overly broad and unenforceable on its face, but granted the PI with respect to the trade secret claim. Specifically, the trial court found that McKoy lawfully learned Horner trade secrets as a result of his former job and that his employment with Teawolf would provide him with the opportunity to misappropriate those trade secrets. The Court of Appeals affirmed.

Both courts noted that under [N.C. Gen. Stat. § 66-155](#), a misappropriation of a trade secret may be established by introducing substantial evidence that the person against whom relief is sought:

- Knows or should have known of the trade secret; and
- Had a specific opportunity to acquire the trade secret for disclosure or use, or acquired, disclosed, or used it without the express or implied consent or authority of the owner.

The courts then link the “opportunity to acquire” a trade secret in § 66-155 with a “threatened misappropriation” under [§ 66-154\(a\)](#) (which allows courts to preliminarily enjoin actual or threatened misappropriation). The subtle link creating an “opportunity to misappropriate” has a significant impact.

In prior cases, to succeed on an inevitable disclosure theory, courts have set the bar higher by requiring some evidence of intentional conduct which had the appearance of an actual “threat.” See our [earlier post](#) on the Business Court's preliminary injunction decision in *Allegis Group, Inc. v. Zachary Piper LLC* where Judge Gale noted that proof of the likelihood of an inevitable disclosure must be “high,” and “ordinarily the mere fact that the employee works for a competitor will be inadequate” to meet that burden.

In other instances, courts have pointed to specific actions which indicate the employee intended to disclose or use the information after s/he resigned. For example, acts previously found sufficient to establish a “threat of misappropriation” have included:

- Before resigning, the employee made copies, downloaded or sent emails to himself

containing customer, supplier, and pricing lists and precise production formulations (*Barker Indus. v. Gould*);

- Employee downloaded trade secret information from employer's servers to a one-terabyte flash drive retained by him after his resignation and then later destroyed evidence (*Bridgetree v. Red F. Marketing*);
- After receiving notification of her termination, employee downloaded information on company contracts, billing rates, business development pipelines, and internal strategy documents (*Marsteller v. ECS Federal*); or
- The employee quit and then immediately started his own company and underbid his former employer on jobs for customers he previously serviced (*Byrd's Lawn & Landscaping v. Smith*).

In contrast, no such competent evidence in the record was presented — or relied upon — in *Horner*. Although the findings of fact in the preliminary injunction note that in the months before his resignation, McKoy sent at least two emails to his personal address containing some Horner confidential and proprietary information, a footnote in the Court of Appeals decision notes that the parties dispute whether the emails were properly admitted, and consequently, the Court did not rely on the emails to support its opinion. Without the emails, there does not appear to be any traditional evidence of an intent or threat to misappropriate any Horner trade secret. And there was no evidence cited as to any actual disclosure or use of a trade secret.

Takeaway from the Decision

Horner potentially changes the landscape in North Carolina trade secret cases: Trial courts can now preliminarily enjoin former employees who lawfully acquired knowledge of trade secrets (during the normal course of their employment) from working for another company in the same industry, even if they did not sign an enforceable non-compete agreement, and even if no competent evidence has been presented that the former employee has used or intends to use the information. The *mere opportunity* alone appears to be enough. This is new ground in North Carolina.

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National Law Review, Volume IV, Number 119

Source URL: <https://natlawreview.com/article/north-carolina-takes-big-leap-opportunity-to-misappropriate-trade-secrets-enough-pre>